

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-220**

SHIRLEY CRENSHAW

APPELLANT

**VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

* * * * *

This matter came on for a pre-hearing conference at 11:30 a.m., ET, on November 13, 2012, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Shirley Crenshaw, was present by telephone at the pre-hearing conference and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and was represented by Hon. Carrie Cotton.

The purposes of the pre-hearing conference were to define the specific penalization(s) alleged by the Appellant, the specific section of KRS 18A which authorizes this appeal, and the relief sought by Appellant, to define the issues, address any other matters relating to this appeal and to discuss the option of mediation.

The Hearing Officer notes this appeal was filed with the Personnel Board on October 1, 2012. The Appellant had been dismissed/separated from her position as a Patient Aide II at the Hazelwood Center effective September 15, 2012. The Appellant was a classified employee without status who was dismissed from a period of initial probation.

In her appeal, the Appellant noted she had been under a doctor's care but had returned with a doctor's statement showing she was eligible to return to work (full duty.) The Appellant stated she does not have a chronic disease and it did not affect her ability to work at this present time.

At the pre-hearing conference, Counsel for the Appellee expressed her intention to file a motion to dismiss for lack of jurisdiction at the Personnel Board. A briefing schedule was established.

Subsequent to the pre-hearing conference, the Appellee filed a Motion to Dismiss. The Appellant has filed a timely response.

This matter is before the Hearing Officer for a ruling on the Appellee's Motion to Dismiss.

BACKGROUND

1. During the relevant times, the Appellant was a classified employee serving a period of initial probation and did not have status.

2. The Appellant was notified by letter dated September 14, 2012, she was being separated from her position as Patient Aide II at the Hazelwood Center, effective September 15, 2012.

3. In its Motion to Dismiss, the Appellee, Cabinet for Health and Family Services, contends the Personnel Board does not have jurisdiction to consider this appeal, as the Appellant has no legal standing to appeal having been separated from a period of initial probation. Counsel notes that the Appellant did not state any grounds for being able to otherwise appeal this action, that is, any claim of discrimination.

4. As noted, the Appellant filed a Response. The Appellant stated that, "I was sick and I returned with a notice to return to work, I am not trying to do anything except return to work even if I have to return on a new probation."

5. A motion to dismiss for failure to state a claim should only be granted if it appears that Appellant would not be entitled to relief under any set of facts that could be proved in support of his claim. *Pari-Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). All allegations on the appeal form are accepted as true for purposes of ruling on the motion. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). The appeal form, like a complaint in a civil action, should be liberally construed in a light most favorable to Appellant. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

6. KRS 18A.111(1) states:

- (1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

FINDINGS OF FACT

1. During the relevant times, the Appellant was a classified employee serving a period of initial probation and did not have status.
2. The Hearing Officer finds that the Appellant, as classified employee, serving a period of initial probation does not have the right to appeal that separation to the Personnel Board unless she is claiming discrimination or some other protected activity. The Appellant does not make such claim.
3. The Hearing Officer finds that as the Appellant was a classified employee serving a period of initial probation when separated, that the Personnel Board does not have jurisdiction to further consider this appeal.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law and based upon the Findings of Fact above, that the Personnel Board lacks jurisdiction to consider this appeal. The Appellant had been serving a period of initial probation as a classified employee and had not yet attained status when she was separated. The Appellant did not claim any discrimination, and thus, the Personnel Board cannot consider this appeal. KRS 18A.111(1) and KRS 18A.095.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SHIRLEY CRENSHAW V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2012-220)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this _____ day of November, 2012.

KENTUCKY PERSONNEL BOARD

**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Carrie Cotton
Ms. Shirley Crenshaw